SHIM TSHUN FATT

v.

PP

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CRIMINAL APPEAL NO: S41-11-2000]
2 OCTOBER 2000

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Whether magistrate court has jurisdiction to hear case under s. 58(1)(b) Immigration Act 1959/63 - Subordinate Courts Act 1948, s. 111 - Effect of decision on pending cases concerning statutes affected by s. 111 Subordinate Courts Act 1948 - Effect of decision on resolved cases concerning statutes affected by s. 111 Subordinate Courts Act 1948*

This was an appeal by the appellant in relation to the issue of jurisdiction of the learned magistrate to hear criminal prosecution under s. 58(1)(b) Immigration Act 1959/63 (the Act) for an offence under s. 56(1)(d) of the Act. It was the appellant's contention that the learned magistrate erred in not accepting the objection as to his jurisdiction to hear the case under s. 58(1)(b) of the Act in view of s. 111 Subordinate Courts Act 1948.

Held:

[1] On plain and literal reading of s. 111 Subordinate Courts Act 1948, it was obvious that the intention therein was to amend or substitute "the Court of a Magistrate of the First Class" with "a Sessions Court". Therefore, the learned magistrate had no jurisdiction to hear the charge preferred against the appellant and the trial thus far was a nullity.

Per curiam:

[1] The most appropriate step to take is to apply the doctrine of prospective overruling in that cases which had already been dealt with and completed need not be disturbed. However, cases which are yet to be determined should be sent or re-registered with the appropriate court. In other words, cases involving statutes affected by s. 111 Subordinate Courts Act 1948 registered and pending in the first class magistrate court when this decision was delivered would have to be recommenced all over again.

[Appeal allowed.]

Case(s) referred to:
Canada Sugar Refining Co Ltd v. R [1898] AC 735 ***(refd)***
Lee Ngak Piew v. PP [1999] 3 CLJ 841 ***(refd)***
Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd & Ors [1962] AIR SC 1543 ***(refd)***
PP v. Chang Han Yuan [1999] 4 CLJ 234 ***(refd)***
PP v. Dato' Yap Peng [1987] 2 MLJ 311 ***(foll)***
PP v. Rajappan [1986] 1 MLJ 152 ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor [1999] 1 CLJ 481 ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor [1999] 2 CLJ 707 ***(refd)***

Legislation referred to:
Immigration Act 1959/63, ss. 56(1)(d), 58(1)(b)
Subordinate Courts Act 1948, ss. 85, 111

For the appellant - David Wong; M/s Peter Lo & Co
For the respondent - Nor Aini Zulkifli SFC

Reported by Izzaty Izzuddin

JUDGMENT

Richard Malanjum J:

Preliminary

On 28 September 2000 I delivered my oral judgment allowing this appeal of the appellant and further held that it would be up to the prosecution on what to do next in so far as it relates to the allegation against the appellant. I also said that I would give my grounds later. I do so now.

To begin, this is an appeal by the appellant in relation to the issue of jurisdiction of the learned magistrate to hear a criminal prosecution under s. 58(1)(b) of the Immigration Act 1959/63 (the said Act) for an offence under s. 56(1)(d) of the said Act. The learned magistrate had earlier on ruled that there was a *prima facie* case against the appellant on the charge preferred.

The Charge

The original charge preferred against the appellant reads:

> Bahawa kamu, pada 23.11.1999 lebih kurang jam 11.30 pagi, bertempat di Pelabuhan Karamunting, di dalam daerah Sandakan, di dalam Negeri Sabah, dengan sengaja telah melindungi;

(1) Lee Miguel (l) 50 thn PI.

(2) Jenie Sellona (p) 21 thn PI.

(3) Maria Cecilia Flores (p) 23 thn PI.

(4) Leah Ancheta (p) 21 thn PI.

dengan mempunyai alasan yang munasabah untuk mempercayai bahawa mereka bukan warganegara Malaysia telah membantu mereka untuk meninggalkan tempat pemeriksaan di Pos Kawalan Imigresen, di Pelabuhan Karamunting tanpa kebenaran Pegawai Imigresen, sepertimana mereka dikehendaki berbuat demikian mengikut peruntukan dibawah s. 24(2)(a) Akta Imigresen 1959/63, olih yang demikian kamu telah melakukan satu kesalahan di bawah s. 56(1)(d) Akta Imigresen 1959/63 dan kamu boleh dihukum di bawah s. 57 Akta yang sama Undang-Undang Malaysia

It was subsequently amended by the presiding magistrate to read as follows:

Bahawa kamu, pada 23.11.1999 lebih kurang jam 11.30 pagi bertempat di Pelabuhan Karamunting di dalam daerah Sandakan di dalam Negeri Sabah telah membantu (abets)

1). Lee Miguel (l) 50 tahun PI

2). Jenie Selona (p) 21 tahun

3). Maria Cecilia Flores (p) 23 tahun dan

4). Lea Ancheta (p) 21 tahun

melakukan kesalahan dibawah s. 6 Akta Imigresen dan oleh yang demikian adalah kamu telah melakukan kesalahan dibawah s. 56(IA)(c) Akta Imigresen dan boleh dihukum dibawah s. 57 Akta yang sama.

At the end of the prosecution case learned counsel for the appellant submitted several points, *inter alia*, that the learned magistrate lacked the jurisdiction to hear the case under s. 58(1)(b) of the said Act. Nevertheless the learned magistrate overruled such point and proceeded to find a *prima facie* case for the appellant to answer on the charge preferred.

The Grounds Of Appeal

In the petition of appeal it is stated thus:

(a) That the learned magistrate erred in law in holding that any challenge to the court's jurisdiction must be made at the beginning of the trial;

(b) That the learned magistrate erred in law in failing to distinguish the case of *PP v. Chang Han Yuan* [1999] 4 MLJ 49 which concerns s. 3(1) of the Women & Girl Protection Act from the present case which concerns s. 58(1)(b) of the Immigration Act;

(c) That the learned magistrate erred in law in placing erroneous emphasis on the word "cognisable";

(d) That the learned magistrate erred in law in misconstruing the interpretation of s. (58)(1) & (3) of the Immigration Act;

(e) That the learned magistrate erred in law in failing to appreciate the significance of s. 58(1) in that s. 58(1)(a) provides jurisdiction in West Malaysia to two courts, namely the Session Court and a Court of First Class Magistrate while in East Malaysia, s. 58(1)(b) provides jurisdiction to only the First Class Magistrate.

(f) By reasons of the aforesaid grounds, the learned magistrate erred in law in holding that he had the jurisdiction to hear the present case under s. 58(1)(b) of the Immigration Act.

The Contentions

For the appellant it was argued, *inter alia*, that the learned magistrate erred in not accepting the objection as to his jurisdiction to hear the case under s. 58(1)(b) of the said Act in view of s. 111 of the Subordinate Courts Act 1948 (the 1948 Act). And it was submitted that the said Act was extended to Sabah prior to 1 June 1981, that is the date of extension of the 1948 Act. Hence, s. 111 applies to the said Act.

For the respondent it was submitted, *inter alia*, that:

(i) section 85 of the 1948 Act allows the Magistrate Court to try the present case in view of the maximum punishment provided for the offence upon which the appellant is charged;

(ii) the word "shall be cognisable" in s. 58 of the said Act read together with s. 111 Subordinate Courts Act should be interpreted as making it permissible and mandatory for the Sessions Court to try those immigration cases filed and registered in the Sessions Court. However it does not bar the magistrate from trying the case if the case is filed and registered in the Magistrate's Court and any court for that matter. Any ouster of a court's jurisdiction must be unequivocal terms; and

(iii) the intention of Parliament in incorporating such provisions in the various acts was never meant to bar such cases but only meant to emphasize and reiterate that the Sessions Court has jurisdiction in those cases irrespective of whether the maximum term of imprisonment was within the jurisdiction of the Magistrate's Court. But once filed and registered in the Magistrate's Court the prosecution will have to be content with the limited punishment that the Magistrate's Court may impose in accordance with law.

The Relevant Statutes

Section 58(1) of the said Act reads:

58. Trial of offences

(1) All offences against this Act shall be cognisable:

(a) in West Malaysia, by a Sessions Court and by a Court of a First Class Magistrate; and

(b) in East Malaysia, by a Court of a First Class Magistrate.

(2) No prosecution shall be instituted in respect of any offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy:

Provided that nothing herein shall prevent any police officer or immigration officer from exercising his powers to arrest or detain any person under this Act.

(3) In West Malaysia any Sessions Court or Court of a First Class Magistrate and in East Malaysia any Court of a First Class Magistrate may notwithstanding anything in the Subordinate Courts Act 1948, the Sabah Criminal Procedure Code or the Sarawak Criminal Procedure Code, as the case may be, impose the full punishment prescribed for any offence except that the Court of a Magistrate other than a Stipendiary Magistrate in East Malaysia shall not impose a sentence of imprisonment for a term exceeding twelve month.

Section 56(1)(d) of the said Act provides:

56. Offences

(1) Any person who:

(a) (Repealed);

(b) (Repealed);

(c) (Repealed);

(d) harbours any person whom he knows or has reasonable grounds for believing to have acted in contravention of this Act;

Section 85 of the 1948 Act provides:

Subject to limitations contained in this Act a First Class Magistrate shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or which are punishable with fine only and offences under sections 392 and 457 of the Penal Code (F.M.S. Cap. 45).

And s. 111 of the 1948 Act states:

> Where in any written law passed or made before the commencement of the extension of this Act to Sabah and Sarawak, there is, in relation to Sabah or Sarawak:
>
> (a) a reference to the Court of a Magistrate of the First Class or a District Court there shall be substituted a reference to a Sessions Court;
>
> (b) a reference to the Court of:
>
> (i) a Magistrate of the Second Class, a Police Court or Court of Small Causes;
>
> (ii) a Magistrate of the Third Class or a Petty Court, there shall be substituted a reference to a Magistrates' Court;
>
> (c) a reference to a Stipendiary Magistrate or a Magistrate of the First Class there shall be substituted a reference to a Sessions Court Judge; and
>
> (d) a reference to a Magistrate of the Second Class or a Magistrate of the Third Class there shall be substituted a reference to a Second Class Magistrate.

Findings

There is no doubt here that the said Act was in fact in force in Sabah prior to 1 June 1981. And there is no doubt that s. 58(1)(b) thereof provides that in Sabah the offences under the said Act are cognisable by a Court of a First Class Magistrate. Hence the question is whether the prescribed court should now be read as Sessions Court owing to s. 111 of the 1948 Act.

On plain or literal reading of s. 58(1)(b) in the context of s. 111 it is clear that it is the intention of the legislature to substitute the court which should have jurisdiction to hear offences under the said Act. I cannot envisage any other purpose in legislating s. 111 other than the foregoing preposition. However such effect is only on those statutes that are already in force in Sabah prior to 1 June 1981.

Learned deputy referred to s. 85 of the 1948 Act to say that indeed a court of a magistrate of the First Class has jurisdiction to hear offences under the said Act in view of the punishment such court can impose.

With respect, to take such a stand it is essential that that section is to be read in isolation. But that should not be the case. (see: *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 CLJ 707).

It is also a canon of statutory construction that a statute should be read as a whole. Each clause in a statute is to be 'construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute' per Lord Davey in *Canada Sugar Refining Co. Ltd v. R* [1898] AC 735 at p. 741. (See also: *Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd & Ors* [1962] AIR SC 1543).

As such I do not think s. 85 of the1948 Act can be interpreted as to give a court of a magistrate of First Class the jurisdiction to hear cases under the said Act without due regard to the provision of s. 111 thereof. Indeed I note that s. 111 comes under the subheading of an amending section. And in fact that section is not so much involved on any other question such as the power of sentencing as s. 85 may have been intended; rather it is intended as an amending section thereby substituting the phrase, *inter alia*, 'a Court of a First Class Magistrate' with the phrase 'a Sessions Court' in any statute that has been in force in Sabah prior to 1 June 1981.

Section 85 is also preceded by the phrase 'Subject to limitations contained in this Act' thereby indicating that it is not a section to stand on its own. Of course it is also possible to say that the word 'limitations' thereto only deals with the power of sentencing and such other limitations contained in the 1948 Act before the insertion of s. 111 thereof. But to do that would tantamount to isolating or limiting the latter section for a specific purpose. I do not think that is in line with the rule of statutory construction. In any event that would have been spelt out in the first instance. Accordingly I would think that s. 111 is also a limitation to s. 85.

As for the other contentions of the learned deputy in that s. 111 should not be interpreted to mean that it has barred a court of a Magistrate of the First Class but that it only gives jurisdiction to the Sessions Court if such case is registered therein, I doubt the merit of such argument. In the first place the phrase 'shall be cognisable' in s. 58 of the said Act does indicate the jurisdiction bestowed upon a court of a Magistrate of the First Class. But in my view that is not the issue. It is the amending effect of s. 111 to s. 58 in that the phrase 'a Court of a First Class Magistrate' found therein should thereafter be read as 'a Sessions Court'. As such the presence of that phrase as highlighted by learned Deputy is quite irrelevant to the issue at hand.

As regards the submission that for s. 111 to override the jurisdiction of the court of a magistrate of the First Class, the intention of Parliament should be clear and unambiguous while in the present case it is not so, with respect I am unable to accept such contention. On plain and literal

reading of s. 111 it is obvious that the intention therein is to amend or substitute for 'the court of a magistrate of the First Class' with 'a Sessions Court'. Hence, I find no ambiguity in that section.

There was also reference to cases which dealt with the issue of jurisdiction of the court of a magistrate of the First Class but they were considering a different statute, namely, the Women and Girls Protection Act 1973. (See: *Public Prosecutor v. Chang Han Yuan* [1999] 4 CLJ 234; *Lee Ngak Piew v. Public Prosecutor* [1999] 3 CLJ 841.)

The respective decisions of the High Courts involved thereof were in conflict and having read the judgments in both cases I am inclined to agree with the latter case. In any event I do not think these cases are of much help in that they do not deal with s. 111 of the 1948 Act.

In the upshot, this appeal should therefore be allowed in that I rule that the court of the magistrate of the First Class that is presently hearing the charge preferred against the appellant has no jurisdiction to hear it and that the trial so far heard is a nullity. (See: *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481; *Public Prosecutor v. Rajappan* [1986] 1 MLJ 152).

In coming to the decision as I did I was conscious of the ramification since there could have been similar cases dealt with by the magistrate court of the First Class in previous instances. And I am also quite sure that there must be similar cases registered and pending for disposal thereat. The question now is to determine the fate of those cases and those that had already been disposed of.

In *Public Prosecutor v. Dato' Yap Peng* [1987] 2 MLJ 311 the doctrine of prospective overruling was applied in that in cases which had already been settled through acquittals or convictions they need not be disturbed. That is quite different from pending cases.

Having therefore considered this matter before me and in view of the conclusion that I have arrived at, I think the most appropriate step to take is to apply the doctrine of prospective overruling in that cases which had already been dealt with and completed need not be disturbed. However cases which are yet to be determined should be sent to or reregistered with the appropriate court.

In other words cases involving statutes affected by s. 111 of the 1948 Act registered and pending in the court of a magistrate of the First Class when this decision was delivered would have to recommence all over again.